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No. 93-438

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL., PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, with respect to claims for veterans' benefits based on exposure to ionizing radiation, the court of appeals properly rejected petitioners' constitutional challenges to a statute that, prior to 1988, limited the amount a claimant may pay a lawyer to $10.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 994 F.2d 583. The opinion of the district court (Pet. App. A110-A147) is reported at 782 F. Supp. 1392. A prior opinion of this Court in this case (Pet. App. A24-A89) is reported at 473 U.S. 305.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1992. A petition for rehearing was denied on June 18, 1993. Pet. App. A148-A149. The petition for a writ of certiorari was filed on September

16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has provided for the payment of benefits to veterans or their survivors for service-connected death or disability (SCDD). See 38 U.S.C. 1101 *et seq.* (Supp. IV 1992), and 1301 *et seq.* (Supp. IV 1992). As a general matter, a person initiates an SCDD claim by submitting a claim form to the Department of Veterans Affairs (DVA). 38 C.F.R. 3.151, 3.152. The claim form is reviewed by a three-person "rating board" from the relevant DVA regional office. See *id.* § 3.103. The rating board determines the extent (if any) of the veteran's disability and whether that disability is service-connected. The rating board is required to "assist a claimant in developing the facts pertinent to [his] claim," and to consider any evidence "offered by the claimant." *Id.* §§ 3.103(a), 3.103(d). A claimant is "entitled to a hearing at any time on any issue involved in a claim." *Id.* § 3.103(c). Proceedings before the rating board "are ex parte in nature"—*i.e.*, no government official appears in opposition to the claimant. *Id.* § 3.103(a). The board must resolve all reasonable doubts in the claimant's favor. *Id.* § 3.102.

The rating board is required to notify the claimant of its ruling. 38 C.F.R. 3.103(b)(1), 19.25. The claimant may then appeal to the local agency by filing a "notice of disagreement" within one year of the rating board's decision. *Id.* §§ 19.25, 20.302. If the agency again denies the claim, it must provide the claimant with a "statement of the case," which summarizes the facts and applicable law upon which

the rating board based its decision. *Id.* § 19.29. The claimant may appeal an adverse decision to the Board of Veterans Appeals (BVA). *Id.* § 20.202. BVA hearings are subject to the same rules as local agency hearings—they are *ex parte*, there is no formal questioning or cross-examination, and no formal rules of evidence apply. *Id.* §§ 20.700-20.701.

Pursuant to the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), claimants who filed a notice of disagreement on or after November 18, 1988, may appeal BVA decisions to the Court of Veterans Appeals (CVA), and then (in some cases) to the Court of Appeals for the Federal Circuit. *Id.* §§ 301(a), 402, 102 Stat. 4113, 4122, codified, as amended, at 38 U.S.C. 7251 *et seq.* (Supp. IV 1992). Claimants such as the members of the class in this case, who did not file a notice of disagreement on or after November 18, 1988, may not appeal the BVA's decision. *Ibid.*

Veterans' organizations make available trained service representatives throughout the claims process to assist claimants in developing and presenting their claims. See Pet. App. A10, A29. The service representatives' important role in the process is contemplated by statute. See 38 U.S.C. 5902 (Supp. IV 1992). Because Congress designed the SCDD administrative claims process to be informal and nonadversary, it originally limited to $10 the amount of fees that claimants could pay an attorney to help process an SCDD claim. 38 U.S.C. 3404, 3405 (1982). Congress revisited the issue in 1988 when it passed the VJRA, and decided to prohibit the payment of attorney's fees for all administrative proceedings through the BVA's initial determination concerning

whether an SCDD claim should be paid. Pub. L. No. 100-687, § 104(a), 102 Stat. 4108, codified, as amended, at 38 U.S.C. 5904(c) and (d) (Supp. IV 1992). For proceedings that follow the BVA's initial determination of a claim, the VJRA relaxes the fee limit so that any fee paid to an attorney "may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim." *Id.* § 104(a), 102 Stat. 4108, codified, as amended, at 38 U.S.C. 5904(d)(1) (Supp. IV 1992). Moreover, the BVA may reduce the fee if it is "excessive or unreasonable." *Id.* § 104(a), 102 Stat. 4108, codified, as amended, at 38 U.S.C. 5904(c)(2) (Supp. IV 1992). Those changes apply only to SCDD claimants who filed a notice of disagreement on or after November 18, 1988, and therefore do not apply to the claimants in this case. *Id.* § 403, 102 Stat. 4122, codified at 38 U.S.C. 3404 note.

2. This case concerns veterans who have filed SCDD claims with the DVA based on exposure to ionizing radiation (IR claims). The process for adjudicating IR claims is identical to that for other SCDD claims, except that Congress and the Veterans' Administration have provided detailed guidance regarding IR claims. In the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984), Congress directed the DVA to establish "guidelines," "standards," and "criteria" for the purpose of achieving simplicity, consistency, and fairness in the resolution of IR claims. *Id.* § 5(a)(1), 98 Stat. 2727. Congress also directed the DVA to consult with an advisory panel of medical and scientific experts, and to decide which diseases can be caused by exposure to

radiation. *Id.* §§ 5(b)(2)(A)(i), 5(b)(2)(B), 98 Stat. 2728.[1] Congress made the DVA's decision of which diseases can be caused by exposure to radiation, as well as all the DVA's regulations in this area, subject to notice and comment rulemaking. *Id.* § 5(c)(1), 98 Stat. 2729.

To discharge those statutory responsibilities, the DVA issued regulations that provide further guidance to local DVA officials in handling IR claims. The regulations direct local DVA officials to investigate an IR claim if the claimant alleges (1) to have been exposed to ionizing radiation through participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, or other specified activities; (2) to have subsequently developed one of 17 radiogenic diseases; and (3) to have developed one of those diseases within a specified period of time. 38 C.F.R. 3.311b. If an IR claimant satisfies those criteria, the regulations require the DVA to investigate the IR claim by gathering factual information and requesting an estimate from the Defense Nuclear Agency of the radiation dose to which the veteran would have been exposed. *Id.* § 3.311b(a)(2). The rating board at the local regional office then decides whether the claim is meritorious. *Id.* § 3.103.

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[1] Congress also directed the DVA to decide on standard periods in which diseases must become manifest in order for claimants to qualify for IR benefits. Pub. L. No. 98-542, § 5(b)(3)(A), 98 Stat. 2728-2729. In addition, Congress directed the Defense Nuclear Agency to issue uniform guidelines for determining the level of radiation doses to which servicemen were most likely exposed in their careers, which relates to whether an injury was service-connected. *Id.* § 7(a), 98 Stat. 2730.

Congress has enacted two other statutes concerning IR claims. The Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. No. 100-321, 102 Stat. 485, creates a presumption that 13 diseases are service-connected if they become manifest within 30 years (or more, with respect to most diseases) of exposure to radiation. See Pet. App. A4. The Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990), as amended by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 3139(c), 104 Stat. 1835-1836 (1990), provides for one-time payments of $75,000 to persons who participated onsite in a test involving the atmospheric detonation of a nuclear device, developed a disease specified in the statute, and satisfy certain other criteria. See 42 U.S.C. 2210 note (Supp. III 1991); Pet. App. A4.

3. This action, a challenge to the constitutionality of the $10 fee limit, was filed in 1983 by two veterans' organizations and four individuals. In 1984, the district court issued a preliminary injunction barring the DVA from enforcing the $10 limit. *National Ass'n of Radiation Survivors* v. *Walters*, 589 F. Supp. 1302 (N.D. Cal.). This Court reversed on direct appeal, holding the fee limit constitutional on its face with respect to SCDD claims generally. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (reproduced at Pet. App. A24-A89).

This Court held that the government's interest in enforcing the fee limit—allowing the administrative system for awarding SCDD benefits to operate informally, so that claimants will not have to divide their awards with lawyers—is entitled to "great weight." Pet. App. A38, A43. "There can be little

doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it," the Court held, because "the claimant would * * * end up paying part of the award * * * to an attorney," and because "destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible." *Id.* at A40, A43.

Given the weight of the DVA's interest in enforcing the fee limit, the Court held that "it would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." Pet. App. A43. The plaintiffs had failed to meet this "difficult" burden, *id.* at A48, because they did not prove "even approximately how often procedural or substantive complexities arise in the run-of-the-mine case, or even in the unusual case," *id.* at A45. Such proof is indispensable because "a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Id.* at A47-A48; *id.* at A53-A54 (O'Connor & Blackmun, JJ., concurring).

The Court further held the private interest at stake to be of diminished constitutional significance since SCDD benefits are not awarded based on need. See Pet. App. A50. The Court held that this factor was "determinative" of the right to employ counsel in this context for the same reasons that an evidentiary hearing is not required prior to a temporary deprivation of social security benefits. See *Mathews* v. *Eldridge*, 424 U.S. 319, 342-343 (1976).

The Court rejected petitioners' First Amendment claims because they "are really inseparable from their due process claims." Pet. App. A52. The Court emphasized that both claims center on "whether the process allows a claimant to make a meaningful presentation." *Ibid.*

Finally, the Court left open whether, on remand, an "as-applied" challenge to the fee limit could be sustained on behalf of individuals or identifiable groups. Pet. App. A52-A55 (O'Connor & Blackmun, JJ., concurring).

4. On remand, petitioners amended their complaint to challenge the constitutionality of the $10 fee limit as applied to persons with IR claims. The district court initially certified "a class consisting of 'all past, present and future ionizing radiation claimants who have, or will have, some form of "active" claim relating to SCDD benefits before the VA.'" Pet. App. A111. The certified class later was limited to claimants who filed notices of disagreement with decisions of a DVA rating board before November 18, 1988, and hence were not eligible to pay counsel more than $10 or to appeal their cases to the new Court of Veterans Appeals or the Federal Circuit. C.A. Excerpts of Record 70. The class also was limited to claimants who had not qualified for lump-sum payments of $75,000 under the Radiation Exposure Compensation Act or presumptively qualified for benefits under the Radiation-Exposed Veterans Compensation Act of 1988. *Ibid.*

The district court held that the $10 fee limit that applied to members of the class (as so confined) was unconstitutional. The district court concluded that the private interest in IR claims is "great" because

"a substantial majority of IR claimants would rely primarily on SCDD benefits for their basic maintenance and support." Pet. App. A115, A138. The court also held that the risk of an erroneous deprivation of that interest is high because "the complexities and uncertainties in IR cases are even greater than most of the difficult toxic tort cases." *Id.* at A138. The court noted that this Court had concluded that the public interest in the fee limit was significant, but said that "[r]egardless of the merit of the Court's analysis at the time, subsequent developments have robbed it of all validity." *Id.* at A140. In that respect, the district court cited the VJRA, in which Congress removed, post-1988, the $10 fee limit for proceedings following the denial of a claim by the BVA, even though Congress prohibited the payment of attorney's fees, post-1988, for claims that are resolved up to that point. *Id.* at A141. On those bases, the district court held that the fee limit violates the First Amendment as well as the Due Process Clause. *Id.* at A147.

5. The court of appeals reversed. Pet. App. A1-A23. It held that the district court had misunderstood the significance of the VJRA because that Act, by retaining a fee limit for administrative proceedings within the VA system up to the initial decision issued by the BVA, "reaffirmed the government's interest in the fee limitation." *Id.* at A9. The court of appeals also held that the district court had overestimated the strength of the private interest in IR claims because "non-need based benefits do not create as strong an interest as need-based benefits." *Id.* at A12-A13, citing *Mathews* v. *Eldridge*, 424 U.S. at 342-343.

In addition, the court of appeals held that the district court was mistaken in its assessment of the risk of erroneous denial of claims because it focused solely on the alleged complexity of the administrative process for IR claims rather than on whether the process "has produced or is substantially likely to produce a significant number of wrongful denials of claims." Pet. App. A15. The district court also erred in this regard, the court of appeals concluded, by focusing on whether lawyers are better able than non-lawyers to present IR claims in the DVA's administrative system, rather than on "whether lawyers are necessary to make the process fair." *Ibid.*

Finally, the court of appeals held that the district court erred by concluding that the fee limit violates petitioners' First Amendment right to petition for redress of grievances. Relying on *Walters*, the court of appeals concluded that "the focus of the First Amendment analysis is essentially the same as that under the Due Process Clause." Pet. App. A22.

ARGUMENT

The court of appeals correctly applied *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), to the IR claims presented on remand. Its decision does not conflict with the decision of any other court of appeals and does not present any question of broad legal significance. To the contrary, the dispute at issue involves a unique administrative claims scheme that was changed significantly in 1988. Moreover, Congress has taken steps to ensure that servicemen injured by exposure to radiation are adequately compensated. Further review is not warranted to determine whether the pre-1988 scheme was

constitutionally infirm with respect to claims based on exposure to ionizing radiation.[2]

1. Petitioners first argue that the court of appeals misread *Walters*. Pet. 18-20. More specifically, petitioners contend that the court of appeals ignored the district court's factual findings concerning the alleged complexity of the IR claims process and the need for lawyers because the court of appeals read *Walters* as holding that the IR claims process is not complex and that lawyers are not necessary to make that process fair. *Ibid.*

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[2] There is no basis in fact for petitioners' statement that "[i]f the Court of Appeals' decision is permitted to stand, a group of more than 10,000 disabled veterans and their families will be denied an opportunity to seek veterans' benefits with the aid of counsel." Pet. 17. On June 22, 1992, in compliance with the district court's decision on remand, the DVA mailed letters to 15,417 putative class members advising them that they might be eligible to have their IR claims readjudicated with the assistance of paid counsel. During the next 13 months, 4,856 IR claimants requested the DVA to determine whether they were eligible for readjudication with paid counsel, and the DVA determined that 2,743 of those claimants were eligible. Only 576 persons actually requested readjudication of their IR claims with the assistance of paid counsel, however, before the DVA suspended readjudication of IR claims in light of the court of appeals' decision. Of course, the persons who are actually affected by the decision here are the subset of those persons who would both request readjudication and then obtain benefits. In assessing the likelihood that members of that subset would obtain benefits, it should be kept in mind that they previously were denied benefits and that they have not qualified for the $75,000 lump-sum payment authorized by the Radiation Exposure Compensation Act or established eligibility under the presumption set out in the Radiation-Exposed Veterans Compensation Act of 1988. See C.A. Excerpts of Record 70 (limiting class).

Petitioners misread the court of appeals' decision. The court of appeals acknowledged that *Walters* "left open the possibility of a constitutional attack on the fee limit as applied to particular classes of veterans." Pet. App. A2. The court of appeals simply held that the evidence on which petitioners rely in advancing such an attack with respect to IR claims does not meet the "extraordinarily strong" standard set forth in *Walters*. See *id.* at A43. For example, the court of appeals correctly held that, under *Walters*, proof that the IR claims process is complex is not in itself sufficient to establish a due process violation. *Id.* at A17. That is true because proof of complexity alone does not establish "how frequently IR claims wrongly are denied" as a result. *Id.* at A18. As *Walters* held, without proof of how often alleged complexities are likely to produce erroneous denials of claims, see *id.* at A45, it is impossible to determine whether the IR claims process is "sufficient for a large majority" of those claims, *id.* at A47; see also *id.* at A37-A38.

Similarly, the court of appeals correctly noted that it is not enough to show that "IR claims present many tasks for which attorneys particularly are well suited," Pet. App. A20, or, as the Court expressed it in *Walters*, that lawyers "could provide more services than claimants presently receive," *id.* at A47. Here, as in *Walters*, plaintiffs failed to show how often IR claims turn on questions of law rather than fact, *id.* at A46, or why "*lawyers* must be available to identify possible errors in *medical* judgment," *id.* at A47. Accord *Washington* v. *Harper*, 494 U.S. 210, 236 (1990) (due process does not require presence of counsel in civil proceedings to authorize medical treat-

ment for mentally ill prisoners).[3] In fact, the evidence at trial demonstrated that factual issues predominate: between 70% and 75% of all IR claims are denied because the claimant did not claim to have a disease that the DVA has decided, by notice and comment rulemaking, can be caused by radiation exposure. See Gov't C.A. Rep. Br. 17 & n.3; cf. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 226-229 (1991).

2. Petitioners also contend that the court of appeals erred by improperly modifying the due process test set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Specifically, petitioners contend (Pet. 21-25) that the court of appeals required proof of actual error in the existing IR claims process and proof that lawyers are absolutely necessary, contrary to what *Mathews* requires.

Those arguments are without merit. As an initial matter, the court of appeals did not require proof of actual error in the IR claims process. Rather, as noted above, the court of appeals merely held that the district court made the same error on remand that it made in 1984: it failed to determine how often the alleged complexities in the claims process would likely cause a claim to be wrongly denied. Compare Pet. App. A14-A18 (court of appeals' opinion) with *id.*

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[3] Since "a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them," Pet. App. A47-A48 (*Walters*), petitioners are wrong to argue (Pet. 20) that the court of appeals erred by failing to address the claims of individual petitioners such as Reason Warehime. Purely anecdotal evidence is not adequate to establish a due process violation, especially on a class-wide basis.

at A44-A48 (*Walters*). As this Court held in *Walters*, one way to establish a sufficient likelihood of wrongful denials—but not the only way—is to show that a significant number of claims have been wrongly denied. *Id.* at A44. *Walters* held that petitioners had adduced no such evidence at that stage of the litigation. *Ibid.* The court of appeals merely held that petitioners were again unable to adduce such evidence on remand, and thus failed to succeed in this method of proving that the fee limit is unreasonable. *Id.* at A14-A18.

Moreover, petitioners err in arguing (Pet. 22) that the frequency of the likelihood that IR claims will be wrongly denied without paid counsel is irrelevant to the due process analysis. As noted above, this Court in *Walters* held that petitioners cannot prove that the fee limit violates due process without establishing how often the absence of lawyers is likely to cause an erroneous deprivation of an IR claim under the existing process. Pet. App. A43-A48. "[A] process must be judged by the generality of cases to which it applies." *Id.* at A47; see *id.* at A53-54 (O'Connor & Blackmun, JJ., concurring).

Likewise, the court of appeals did not err in considering the probable value of attorneys in preventing erroneous denials of IR claims under the current administrative system. Under *Walters*, the relevant issue is whether "the right to retain and compensate an attorney in [IR] cases is a necessary element of procedural fairness under the Fifth Amendment." Pet. App. A49. The court of appeals held that the petitioners failed to meet this standard because they established only that "IR claims present many tasks for which attorneys particularly are well suited." *Id.*

at A20. The court of appeals was right to so rule, because *Walters* held that such evidence does not establish that the right to retain and pay counsel is necessary to render an administrative claims process fair. *Id.* at A47-A49.

The court of appeals also correctly held that petitioners did not prove their case by relying on statistical evidence of an alleged disparity in the success rates of IR claimants who hired counsel and those who did not. Pet. App. A20-A21. The evidence on which petitioners relied revealed that IR claims handled by lawyers were granted in 5 of 31 (16%) cases, whereas IR claims not handled by lawyers were granted in 35 of 5,456 (0.6%) cases. *Id.* at A20; see Pet. 23. The court of appeals held that this evidence did not provide the "extraordinarily strong" proof of the need for paid counsel in IR claims that is necessary under *Walters* (see Pet. App. A43), because petitioners adduced no evidence concerning the strength of the claims studied. See *id.* at A20-A21. Without such evidence, it is impossible to know whether the IR claims handled by lawyers were granted more frequently because lawyers are generally necessary, or because those claims were stronger. The latter conclusion seems more likely, since service representatives generally provide assistance to any claimant without regard to the likelihood of success. See *id.* at A29. Lawyers, in contrast, would most likely not assist persons (such as the 70% of IR claimants who did not have a disease that can be caused by radiation exposure, see Gov't C.A. Rep. Br. 17 & n.3) with very little chance of qualifying for benefits.

3. Petitioners also argue that the court of appeals erred by relying on legislative history rather than on the district court's findings of fact concerning the procedural complexities of the IR claims process. Pet. 25-27. That argument furnishes no basis for further review for several reasons.

First, the court of appeals' main reason for rejecting petitioners' reliance on the alleged procedural complexities of the IR claims process was that petitioners failed to prove how often those alleged complexities are likely to cause the erroneous denial of an IR claim. See Pet. App. A15-A18. The court of appeals cited the legislative history of the VJRA only to confirm its conclusions about the lack of proof in this context. *Ibid.*

Second, the court of appeals was correct to take the legislative history of the VJRA into account. As this Court held in *Walters*, "[w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Pet. App. A48 n.12; see also *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 572, 579 (1990). The Senate and House Committee Reports concerning prior versions of the VJRA specifically found that the existing SCDD claims process operates fairly without the need for paid counsel. For example, the Senate Committee Report stated:

> [T]he existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure,

> with the VA generally securing the relevant military records as well as evaluating the merits of the claim. * * * [T]here would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application.

S. Rep. No. 418, 100th Cong., 2d Sess. 63 (1988). See also H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 13-14 (1988). Likewise, the House and Senate Committees also reaffirmed the effective role that service representatives play in helping veterans to file claims with the DVA. See Pet. App. A19 (quoting committee reports).

Petitioners also contend (Pet. 26) that the court of appeals erred by overlooking Section 2(12) of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, which states that IR claims "present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service." 98 Stat. 2726. That finding, however, does not establish that Congress thought the IR claims process would be unfair without paid counsel, especially given that Congress specifically decided to retain the fee limit in the VJRA for initial DVA administrative proceedings. Thus, Congress responded to the differences between IR claims and other SCDD claims not by revoking the fee limit, but rather by requiring the DVA to provide additional guidance to its claims officers who investigate and rule upon IR claims. It also directed the DVA to issue detailed regulations governing IR claims and established statutory presumptions to aid IR claimants.

Petitioners also note (Pet. 27) that individual Members of Congress have criticized the DVA fee limit. The statements of individual Members, however, are an unreliable basis on which to discern congressional intent, particularly where, as here, the relevant statutes and committee reports show that Congress was satisfied with the fee limit and specifically decided to retain it in large part. See *Bath Iron Works Corp.* v. *Director, OWCP*, 113 S. Ct. 692, 700 (1993). Moreover, as would be expected, individual Members of Congress also spoke in favor of the fee limit. For example, Senator Cranston, who introduced the Senate's version of the VJRA, stated that "[t]he compromise agreement before us today prohibits attorneys fees until after the BVA makes its first final decision, thus contemplating that the current practice of veterans being assisted by skilled veterans' service officers throughout the VA and initial BVA administrative processes would continue to operate exactly as it does now." 134 Cong. Rec. 31,469 (1988). Senator Cranston's statement serves to confirm that Congress retained the fee limit in the VJRA for initial DVA administrative proceedings in order to prevent lawyers from turning that system into the formal, adversarial system that petitioners would prefer.

4. This Court in *Walters* rejected petitioners' First Amendment arguments at that stage of the litigation because those claims, "at base, are really inseparable from their due process claims." Pet. App. A52. In the Court's view, petitioners' due process and First Amendment arguments "focused on substantially the same question"—"whether the process allows a claimant to make a meaningful presentation"

of an SCDD claim to the government. *Ibid.* Because petitioners had not proved that the presence of paid lawyers is necessary to make a meaningful presentation of an SCDD claim, the Court held that their First Amendment claim fell short of the mark. *Ibid.*

The same disposition of petitioners' First Amendment claims is appropriate at this stage of the litigation. For the reasons stated above, petitioners failed to prove that paid lawyers are necessary to make a meaningful presentation of IR claims. Since petitioners' First Amendment claims on remand are based on "substantially the same" question as their due process claims, the court of appeals correctly rejected their First Amendment claims. Pet. App. A22-A23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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